IN THE

# Supreme Court of the United States

OCTOBER TERM, A. D. 1902.

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| DAVID MARK CUMMINGS and GRACE DUNLAP KENNEDY, *Appellants,* vs. THE CITY OF CHICAGO, *Appellee.* | Appeal from the Circuit Court of the United States for the Northern District of Illinois. |

## STATEMENT.

This is an appeal from the decree of the court below dismissing for want of equity, the appellant's bill of complaint, which was brought by them as the owners of the premises described in their bill with a frontage of 479 feet on the Calumet river, to restrain the City of Chicago from interfering with them in constructing a dock in front of their premises under a permit issued to them by the secretary of war of the United States and in accordance with plans approved by the chief of engineers of the United States army. The cause was heard on the general de-

murrer of the appellee to the bill of complaint, which was sustained.

The material matters stated in the bill, which the demurrer conceded to the true, were:

That the complainants as the heirs-at-law of C. R. Cummings, were the owners in fee of a portion of block 108, in subdivision of parts of fractional sections 5 and 6, township 37 north, of range 15, east of the Third Principal Meridian, which fronted to the east for 479 feet on the Calumet river, and were the owners in fee of the bed of the river, to the center line thereof, except as their title and right should be affected by the deed from C. R. Cummings to the United States therein subsequently mentioned. (Trans., 2, 3.)

That the Calumet river is a navigable stream with its natural outlet into Lake Michigan, forming at its mouth the harbor of South Chicago in the City of Chicago, and is one of the navigable waters of the United States upon which traffic is carried on between the states of the United States. (Trans., 3.)

That in its natural and unimproved condition it was navigable only for small vessels and for a short distance above its outlet into Lake Michigan, but that it has been improved by the United States and channel lines have been established and its channel deepened and broadened.

That by act of Congress of August 2, 1882, it was provided that the secretary of war should appoint a board of engineers to examine this river and report upon the practicability and best method of perfecting and maintaining a channel for through navigation, locating the lines of channel to be improved and of docks that might be constructed by private individuals and clearly defining the same, under the direction of the chief of engineers of the United

States army, and that the secretary of war should report to Congress the result of said examination and the cost of the improvement. That the secretary of war appointed this board, who examined the river and caused a survey to be made under the direction of the chief of engineers, defining the lines of the channel thereof and of the docks to be constructed thereon, and the secretary of war thereafter reported to Congress the estimated cost of the proposed improvement of the river.

That an appropriation was made by the act of Congress of July 5, 1884, for the improvement of the river and it was provided therein that no portion of the sum appropriated for said improvement "shall be expended until the right of way shall have been conveyed to the United States free from expense and the United States shall be fully released from all liability for damages to adjacent property to the satisfaction of the secretary of war." (Trans., 4.)

That thereafter the United States caused a plat to be made establishing the lines of the channel and the dock lines of this river, which plat was approved by the chief of engineers and was recorded in the recorder's office of Cook County, Illinois.

That after the making of this survey and the establishment of the channel and dock lines Columbus R. Cummings in accordance with the proviso of the act of July 5, 1884 making said appropriation for the improvement of the river, and of a similar proviso in the act of August 5, 1886, continuing the said improvement, by deed, dated January 5, 1888, granted to the United States a free and unobstructed right of way for the improvement of the river in front of the said block 108, except the north 200 feet thereof, which Cummings did not then own but which he subsequently acquired, describing this right of way as that portion

of said block 108, except the north 200 feet, lying between the proposed dock lines of the Calumet river, as shown upon a plat which was attached to said deed and made a part thereof, and was a part of the channel as established and shown on the plat thereof approved by the chief of engineers of the United States army and recorded in the recorder's office of Cook County, Illinois, and further providing that the shore or dock lines as established and shown on said plat should thereafter for all purposes be taken for the true meandered lines of said stream; and Cummings by said deed released to the United States any claims of any nature that he might then or thereafter have against it by reason of the improvement of said river.

Attached to said deed and made a part thereof was a plat showing the dock or shore line of block 108 which was designated upon said plat as "proposed dock line," which was the line fixed and established by the chief of engineers as the channel or dock line of the river as shown on the plat approved by the chief of engineers and recorded in the recorder's office of Cook County; and the bill made a copy of this plat an exhibit marked "Exhibit A," and also made a copy of the plat which was filed for record of the survey made by the chief of engineers an exhibit marked "Exhibit A ½." (See copies inserted between pages 10 and 11 of the transcript.)

The bill further alleged (Trans., 5), that this deed was made by Cummings under the provisions of the acts of July 5, 1884, and August 5, 1886, and that the making of it was exacted by the United States as a condition precedent to the improvement of the river, and that under this deed and its provisions the dock line in front of block 108 became for all purposes thereafter established and fixed, as shown by the plat attached to the deed as the "proposed

dock line," designated thereon, and that this line was established and fixed by the United States as the true meandered line of said stream; and that similar deeds were made to the United States by the owners of all of the property fronting on the Calumet river on both sides from the point of its outlet into Lake Michigan to the limits of the survey and plan of improvement adopted for said river by the United States, as shown upon the plat approved by the chief of engineers, including the owners of the north 200 feet of block 108, from whom Cummings subsequently acquired title; and that the United States duly accepted these deeds and thereafter entered upon the improvement of said river in accordance with these surveys and plans adopted therefor by the chief of engineers under the authority and direction of Congress, and thereby established the dock or channel line on the west side of the river, as shown by the said plat approved by the chief of engineers and by the plat attached to Cummings' deed, (Exhibit A); and the United States took possession of the river and caused its channel thus fixed and established to be improved in accordance with said plan of improvement. (Trans., 5, 6.)

The bill then set out the provisions of section 7 of the act of Congress of September 19, 1890, by which Congress assumed jurisdiction over all navigable waters of the United States, and of section 10 of the act of Congress of March 3, 1899, which forbids the erection of any wharf, etc., in any navigable waters of the United States except on plans recommended by the chief of engineers and authorized by the secretary of war, and alleged (Trans., 7), that, thereafter, it became necessary for the complainants, who were then in possession of the premises, as executors of the last will of Columbus R. Cummings and as his sole

heirs-at-law and residuary devisees under said will, to build a new dock on said premises and for that purpose they caused plans to be prepared for the building of a new dock extending along the entire river front of the said premises, but wholly to the west of the dock and meandered line as established by the United States, which they proposed to build in conjunction with the building of a new dock along the south 300 feet of said block 108, owned by the Calumet Grain and Elevator Company, and that this dock was to be built entirely upon the land belonging to the complainants and within the line established by the United States as the dock line of said premises.

That these plans were submitted by complainants and by the Calumet Grain and Elevator Company to the secretary of war and to the chief of engineers of the United States army and application was made to the secretary of war for permission to rebuild said dock in front of block 108 along the lines shown on said plans; that these plans for the building of said dock were approved by the United States engineer stationed at the City of Chicago, and subsequently recommended by the chief of engineers and under date of May 12, 1900, the secretary of war of the United States granted permission to the complainants to rebuild said dock along the line shown by said plans subject, however, to the condition that the work of building said dock should be done subject to the supervision and approval of the engineer officer of the United States army in charge of the locality. At the same time similar permission was granted to the Calumet Grain and Elevator Company to build its proposed dock in front of the south 300 feet of this block along the line shown by said plan and a written permit for the building of said dock along the line shown on said plans which were attached to the said permit and

made a part thereof issued to complainants and to said elevator company, which recited the provisions of section 10 of the act of March 3, 1899. (A copy of this permit and of the plan attached thereto was made "Exhibit B" to the bill. See Trans., 12, and copy of plan inserted between pages 12 and 13.)

That this permit was issued by the secretary of war under the provisions of the act of March 3, 1899, and that upon the approval and recommendation of this plan for the building of said proposed dock by the chief of engineers and upon the authorization thereof by the secretary of war and the issuance of said permit the complainants became under the provisions of the act of March 3, 1899, of lawful right entitled to build their proposed dock in front of these premises along the line shown by the said plan subject only to the condition as to the supervision and approval of the engineer officer of the United States army in charge of this locality; and after the granting of this permission and the issuance to them of this permit they entered into contracts for the furnishing of material and the building of said dock in accordance with the permit and along the lines shown by said plan, and about the 15th day of October, 1900, entered upon this work and were engaged in prosecuting it by their contractors and agents when the City of Chicago by its police and its officers by force and by threats of arrest put a stop to it, asserting that no permit for the building of said dock had been first issued by it, its agents or officers, and that such work could not be prosecuted unless a permit therefor should be issued by the Department of Public Works of said city. (Trans., 8.)

That the Calumet river at its mouth and at the point where your orators were constructing said dock under this permit from the secretary of war is within the limits of the City

of Chicago, and that the City of Chicago asserted and claimed the right to put a stop to this work and prevent its continuance, because no permit had been issued from its department of public works under certain ordinances theretofore passed by its city council which purported to prescribe that it should be the duty of the harbor master of the City of Chicago to require all parties who should be engaged in repairing, renewing, altering or constructing any dock within the City of Chicago to produce such permit and in default of its production to cause the arrest of such parties so engaged in such work and the removal of such dock; and that the officials of the City of Chicago asserted and claimed the right to stop this work and prevent its prosecution notwithstanding the secretary of war had granted permission and authority for its prosecution. That thereafter upon further consideration the city engineer of said city, who was the officer of the department of public works of said city that had charge of the building of docks within the City of Chicago agreed with complainants that the city had no power or authority to interfere with or prevent the building of this dock after its approval and authorization by the secretary of war under the provisions of the act of March 3, 1899, and agreed that the work should not be interfered with by the city; and thereupon the complainants renewed said work and were actively engaged therein when on October 29, 1900, they were again stopped by the City of Chicago through its police, and their contractors and agents and servants were forced to discontinue it and were threatened with arrest and violence if they should attempt to continue further with it, and they have been notified by the City of Chicago that they will not be allowed to continue this work or build this dock in front of their premises, notwith-

standing the permission and authority given them to build it by the secretary of war, and it refuses to recognize the permission and authority given to the complainants by the secretary of war and their right under the act of Congress of March 3, 1899, to build their dock under this permit of the secretary of war and the approval and recommendation of the plan therefor by the chief of engineers of the United States army.

And complainants claimed under these acts of Congress set forth in their bill the right to build this dock in accordance with the permit issued to them by the secretary of war and along the lines shown upon the plan attached thereto (Exhibit B), and they charged that the United States had taken and was exercising jurisdiction over said river and had exclusive jurisdiction as to what structures should be permitted to be built in said river and on what lines, and that the City of Chicago had no power or authority to interfere with or prevent them from building the said dock in front of their premises in accordance with the permission granted them by the secretary of war and on the land shown by said plan approved and recommended by the chief of engineers. (Trans., 9.)

They charged that the right to build their dock in front of their premises under this authority from the secretary of war and within the dock lines established by the said survey and by the deed from Cummings to the United States was a property right which they had as the owners of said premises and of the land upon which the dock was to be built, and that the action of the City of Chicago in preventing the building of it by them was a taking of their property without due process of law and a taking for public use without just compensation.

The prayer of the bill (Trans., 10), was that a writ of in-

junction should issue enjoining the City of Chicago, its officers and agents from interfering with the building of said dock in front of said premises in accordance with the terms granted by the secretary of war and along the lines shown in the plan recommended by the chief of engineers of the United States army and from attempting to prevent the building of it, and that upon the final hearing of the cause it should be decreed that under the said acts of Congress therein set forth the complainants have the right by virtue of this permission from the secretary of war to build their dock on the lines shown by the plan recommended by the chief of engineers and that the City of Chicago had no right, power or authority to interfere therewith and that the preliminary injunction be made perpetual.

The motion of complainants for a preliminary injunction was thereafter denied and, subsequently, on May 14, 1901 (Trans., 14), the decree was entered sustaining the demurrer to the bill of complaint and dismissing the bill for want of equity, from which this appeal is prosecuted.

## Assignment of Errors.

The errors assigned are:

1. That the court erred in sustaining the demurrer to this bill.

2. That the court erred in dismissing the bill for want of equity.

# BRIEF OF ARGUMENT.

## I.

THE UNITED STATES, IN ITS SURVEY AND PLAT OF THE CHANNEL OF THIS RIVER AND IN ITS IMPROVEMENT OF THE RIVER UNDER THE ACTS OF CONGRESS OF AUGUST 2ND, 1882, AND JULY 5TH, 1884, HAS FIXED AND ESTABLISHED THE LINES OF THE CHANNEL OF THE RIVER AND OF THE DOCKS THAT MIGHT BE CONSTRUCTED THEREON.

## II.

BY THE TERMS AND PROVISIONS OF THE DEEDS WHICH CONGRESS REQUIRED TO BE MADE TO THE UNITED STATES BY THE OWNERS OF THE LAND FRONTING ON THIS RIVER, AS A CONDITION FOR THE EXPENDITURE OF THE MONEYS APPROPRIATED FOR THE IMPROVEMENT OF THE RIVER, THE SHORE AND DOCK LINES AS ESTABLISHED AND FIXED BY THE GOVERNMENT SURVEY, ARE TO BE TAKEN FOR ALL PURPOSES AS THE TRUE MEANDER LINES OF THIS STREAM; AND, UNDER THE DEED WHICH WAS MADE TO THE UNITED STATES PURSUANT TO THIS PROVISION OF THE ACT OF CONGRESS, AFORESAID, BY COLUMBUS R. CUMMINGS, AND UNDER THE ACTS OF CONGRESS OF AUGUST 2ND, 1882, AND OF JULY 5TH, 1884, REFERRING TO THE IMPROVEMENT OF THIS RIVER, THE APPELLANTS ARE ENTITLED AS THE OWNERS OF THESE PREMISES TO BUILD THEIR PROPOSED DOCK ON THE LINE SHOWN BY THE PLAN ATTACHED TO THE PERMIT THAT ISSUED TO THEM BY THE SECRETARY OF WAR, WHICH IS WITHIN THE LINE WHICH HAS BEEN ESTABLISHED BY THE UNITED STATES AS THE DOCK LINE OF THESE PREMISES AND WHICH HAS BEEN FIXED AND MADE THE MEANDER LINE OF THIS STREAM.

As riparian owners the appellants had the right to build their dock, subject only to the public easement for the purpose of navigation.

*Yates* v. *Milwaukee*, 10 Wall., 497.
*Chicago* v. *Laflin*, 49 Ill., 172.
*Chicago* v. *McGinn*, 51 Ill., 266.
*Chicago* v. *Van Ingen*, 152 Ill., 624.

## III.

CONGRESS HAS TAKEN JURISDICTION OVER THIS RIVER AS ONE OF THE NAVIGABLE WATERS OF THE UNITED STATES, AND HAS IMPROVED IT AND MADE IT NAVIGABLE AND AVAILABLE FOR COMMERCE, AND HAS DIRECTED AND CAUSED THE CHANNEL AND DOCK LINES OF THE RIVER TO BE DEFINED AND ESTABLISHED. ITS JURISDICTION OVER THIS RIVER FOR THE PURPOSE OF NAVIGATION AND THE PROTECTION THEREOF, AND ITS POWER TO CONTROL THE BUILDING OF DOCKS OR OTHER STRUCTURES IN THIS RIVER IS, WHEN EXERCISED, SUPREME; AND NEITHER THE STATE OF ILLINOIS NOR THE CITY OF CHICAGO, ITS AGENT, HAS ANY POWER TO INTERFERE WITH OR PREVENT THE ERECTION OF ANY DOCK OR STRUCTURE WHICH CONGRESS HAS AUTHORIZED TO BE BUILT IN THIS RIVER.

*Gibbons* v. *Ogden*, 9 Wheat., 1.
*Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 Howard, 518, 566.
*Same Case*, 18 Howard, 421, 460.
*Gilman* v. *Philadelphia*, 3 Wall., 713, 724.
*Pound* v. *Turck*, 95 U. S., 459.
*Wisconsin* v. *Duluth*, 96 *id.*, 379, 387.

*Bridge Co.* v. *United States,* 105 *id.,* 470, 475, 479.

*Cardwell* v. *American Bridge Co.,* 113 *id.,* 1.

*Willamette Iron Bridge Co.* v. *Hatch,* 125 *Id.,* 1.

As to power of Congress to determine what shall or shall not be deemed in law an obstruction to navigation.

*Penn.* v. *Wheeling, etc., Bridge Co.,* 18 Howard, 421, 460.

*In re Clinton Bridge,* 10 Wall., 454.

*So. Carolina* v. *Georgia,* 93 U. S., 4.

*North Bloomfield Gravel Mining Co.* v. *United States,* 88 Fed. Rep., 675.

State has no power to interfere with erection of any structure in navigable waters authorized by Congress.

*Decker* v. *B. & N. Y. R. Co.,* 30 Fed. Rep., 723.

*Stockton* v. *B. & N. Y. R. Co.,* 32 *id.,* 9.

*Penn. R. Co.* v. *N. Y. R. Co* , 37 *id.,* 129.

On question as to police power of state, in addition to authorities above cited, see, also,

*County of Mobile* v. *Kimball,* 102 U. S., 691, 699.

*Escanaba Co.* v. *Chicago,* 107 U. S., 678, 683.

*Sands* v. *Manistee River Imp. Co.,* 123 U. S., 288.

## IV.

UNDER THE PROVISIONS OF SECTION 10 OF THE ACT OF MARCH 3RD, 1899, THE SECRETARY OF WAR WAS EMPOWERED BY CONGRESS TO APPROVE AND PERMIT THE ERECTION OF DOCKS IN NAVIGABLE RIVERS OF THE UNITED STATES ON PLANS RECOMMENDED BY THE CHIEF OF ENGINEERS; AND THE PERMIT WHICH WAS ISSUED TO THE APPELLANTS BY THE SECRETARY OF WAR TO REBUILD THEIR DOCK IN FRONT OF THESE PREMISES ON THE PLAN ATTACHED THERETO, WHICH WAS APPROVED BY THE CHIEF OF ENGINEERS (EXHIBIT B), GAVE THEM FULL RIGHT AND AUTHORITY UNDER SAID ACT OF CONGRESS TO BUILD SAID DOCK IN ACCORDANCE WITH SAID PERMIT, AND THE CITY OF CHICAGO HAD NO POWER OR AUTHORITY TO INTERFERE WITH OR PREVENT THEM FROM BUILDING THIS DOCK, AND COULD NOT LAWFULLY STOP ITS CONSTRUCTION.

The Appellants base their claim of right to build this dock without interference from the City of Chicago on two grounds:

1. On the acts of August 2, 1882, and July 5, 1884, and the provision of the deed from Cummings to the United States, that this lien, which has been established by the United States, shall be taken as the "true meandered" line of this stream.

2. On the act of March 3, 1899, and the permit, which the secretary of war has issued to them thereunder.

This authority from the secretary of war is given by and under the act of March 3, 1899, and is paramount, and excludes any state or municipal control of this same matter.

*So. Carolina* v. *Georgia*, 93 U. S., 4.
*Wisconsin* v. *Duluth*, 96 U. S., 379.

*United States* v. *Milwaukee & St. Paul Ry. Co.*, 5 Bissell, 410; Federal Cases No. 15,778.

*United States* v. *Milwaukee & St. Paul Ry. Co.*, 5 Bissell, 410; Federal Cases No. 15,779.

*Willamette Bridge Co.* v. *Hatch*, 125 U. S., 1.

*United States* v. *Bellingham Bay Boom Co.*, 176; *id.*, 211, 217.

*United States* v. *Ormsby*, 74 Fed. Rep., 207.

*United States* v. *City of Moline*, 82 *id.*, 592.

The delegation of power to the secretary of war by the act of 1899 to issue this permit is valid.

In addition to authorites last above cited see

*Luther* v. *Borden*, 7 How., 1.

*Miller* v. *Mayor of New York*, 109 U. S., 385.

*Gibbons* v. *Ogden*, 9 Wheat. 1.

*Field* v. *Clark*, 143 U. S., 649.

*L. S. & M. S. Ry. Co.* v. *State of Ohio*, 165 *id.*, 365.

## V.

THE RIGHT TO BUILD THIS STRUCTURE UPON THEIR PREMISES WITHIN THE DOCK LINE ESTABLISHED BY THE UNITED STATES AND UNDER THE PERMIT ISSUED TO THEM UNDER THE SAID ACT OF CONGRESS IS A PROPERTY RIGHT VESTED IN THE APPELLANTS WHICH IS CONCEDED TO BE OF GREATER VALUE THAN $2,000, AND THE ACTION OF THE CITY OF CHICAGO IN PREVENTING THE BUILDING OF SAID DOCK BY THE APPELLANTS IS A TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING THEREOF FOR PUBLIC USE WITHOUT JUST COMPENSATION IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

## ARGUMENT.

The appellee by its demurrer has conceded all of the matters stated in the bill, so that it appears as admitted on this record, that the United States has taken jurisdiction over this river and possession of it, and has acquired by the conveyances, which the proprietors of the land fronting on it have made to it, an easement in the bed of the river within the channel lines, which it established in the improvement of the river; that it has established the dock lines on this river, and has by the terms of the deeds, taken by it from these proprietors, in effect agreed that these dock lines be hereafter for all purposes taken as the "true meander lines" of the stream; and finally that the appellants have been authorized by the officials of the United States, to whom Congress has delegated the power and authority to approve and authorize the construction of wharfs and docks in the navigable waters of the United States to build this dock within the dock line as fixed and established by the United States and within the line which, by the terms of the deed from Cummings to the United States, is to be hereafter taken as the true meandered line of said stream and upon their own property to which they have the title in fee, and it becomes simply a question whether the City of Chicago, a municipal corporation of the State of Illinois, has any right, power or authority to interfere with the appellants in the construction of their dock under this permit and to stop them in the construction thereof and prevent them from building it as thus authorized.

The contention of the appellants is that this river is a part of the navigable waters of the United States and that

Congress, acting under the power vested in it to regulate commerce, has assumed jurisdiction over it, improving, deepening and widening its channel, and has established and defined its channel and the dock lines within which the adjoining proprietors should build their docks, and has expressly defined the terms and conditions upon which they should have authority to make such improvements as thus contemplated here by the appellants, and that its jurisdiction over this river and the improvement thereof and over the docks and wharves that shall be built along the same is supreme: that the appellants have received permission and authority under these acts of Congress for the making of this improvement and the building of their dock upon the plan approved by the chief of engineers and authorized by the secretary of war, and that neither the State of Illinois nor any municipality created by it, nor any authority other than the United States has any lawful right or power to prevent the appellants from exercising the authority given them by the United States, or to interfere with them in the exercise of that authority or to clog it with any additional burdens or restrictions.

## I.

THE UNITED STATES, IN ITS SURVEY AND PLAT OF THE CHANNEL OF THIS RIVER AND IN ITS IMPROVEMENT OF THE RIVER UNDER THE ACTS OF CONGRESS OF AUGUST 2, 1882, AND JULY 5, 1884, HAS FIXED AND ESTABLISHED THE LINES OF THE CHANNEL OF THE RIVER AND OF THE DOCKS THAT MIGHT BE CONSTRUCTED THEREON.

22 U. S. Stats. at Large, p. 194.

23 U. S. Stats. at Large, p. 143.

As the bill of complaint alleges and as the demurrer admits, this river, in its natural and unimproved condition,

was navigable only for small vessels and for only a short distance above its outlet into Lake Michigan; and, in order to make it available for navigation for larger vessels and from its outlet to the fork of the river at Calumet lake, it became necessary that a channel should be established and improved and the channel deepened and broadened. This the United States has done, and in the very inception of its improvement of this river Congress provided that an examination should be made of the river by a board of engineers, to be appointed by the secretary of war, who should report upon the practicability and best method of perfecting and maintaining a channel for through navigation and should limit and locate the lines of the channel to be improved by the United States and the dock lines, and should clearly define these lines, acting under the direction of the chief of engineers of the United States army. This was done, and this board, appointed by the secretary of war for the examination of the river, caused a survey to be made defining the lines of the channel of the river and of the docks constructed thereon under the direction of the chief of engineers, and the secretary of war reported to Congress the estimated cost of the proposed improvement of the river.

This was followed by the act of July 5, 1884 (*supra*), making an appropriation for the improvement of the river, in which it was expressly provided that no portion of the money so appropriated should be expended "until the right of way shall have been conveyed to the United States free from expense and the United States shall be fully released from all liability for damages to adjacent property to the satisfaction of the secretary of war."

After the adoption of this act the United States, in its plan of improvement of the river and for the purpose of making the river navigable for larger vessels, caused a plat

to be made establishing the lines of the channel of the river and fixing and establishing the dock lines thereof, and this plat was approved by the chief of engineers and was duly recorded in the recorder's office of Cook County, Illinois; and thereafter the United States did improve this river and widen and deepen its channel in accordance with this plat and on the lines thereby established as the channel lines of the river and took possession of the river and caused its channel to be improved in accordance with its plan of improvement and on the lines fixed and established by its survey and recorded plat.

By these acts the United States has taken possession of this river for the purpose of its improvement for the benefit of navigation and in the exercise of the power conferred upon Congress by the constitution to regulate commerce, and it has definitely and finally fixed and established the channel lines of the river and the dock lines within which docks and wharves may be constructed by the proprietors of the land fronting on the river. The facts here are as convincing as in the case of *Wisconsin* v. *Duluth*, 96 U. S., 387, where this court says, referring to the evidence appearing before the court as to the acts of Congress and of the war department thereunder concerning the improvement of the harbor at Duluth:

"If the merest recital of these acts of Congress, and of the war department under them, do not establish that proposition (namely, that Congress had taken express jurisdiction over this work of improving the navigation of the harbor there in question) we can have little hope of making it plain by elaborate argument."

## II.

BY THE TERMS AND PROVISIONS OF THE DEEDS WHICH CONGRESS REQUIRED TO BE MADE TO THE UNITED STATES BY THE OWNERS OF THE LAND FRONTING ON THIS RIVER, AS A CONDITION FOR THE EXPENDITURE OF THE MONEYS APPROPRIATED FOR THE IMPROVEMENT OF THE RIVER, THE SHORE AND DOCK LINES AS ESTABLISHED AND FIXED BY THE GOVERNMENT SURVEY ARE TO BE TAKEN FOR ALL PURPOSES AS THE TRUE MEANDER LINES OF THIS STREAM; AND, UNDER THE DEED WHICH WAS MADE TO THE UNITED STATES PURSUANT TO THIS PROVISION OF THE ACT OF CONGRESS, AFORESAID, BY COLUMBUS R. CUMMINGS, AND UNDER THE ACTS OF CONGRESS OF AUGUST 2, 1882, AND OF JULY 5, 1884, REFERRING TO THE IMPROVEMENT OF THIS RIVER, THE APPELLANTS ARE ENTITLED AS THE OWNERS OF THESE PREMISES TO BUILD THEIR PROPOSED DOCK ON THE LINE SHOWN BY THE PLAN ATTACHED TO THE PERMIT THAT ISSUED TO THEM BY THE SECRETARY OF WAR, WHICH IS WITHIN THE LINE WHICH HAS BEEN ESTABLISHED BY THE UNITED STATES AS THE DOCK LINE OF THESE PREMISES AND WHICH HAS BEEN FIXED AND MADE THE MEANDER LINE OF THIS STREAM.

The provision of the act of August 2, 1882, relating to the improvement of this river, were as follows (22 U. S. St. at Large, p. 194):

"Improving harbor at Calumet, Illinois: Continuing improvement, thirty-five thousand dollars: *Provided*, That with a view to the improvement of the Calumet river, in the State of Illinois, from its mouth to the fork at Calumet lake, the secretary of war shall appoint a board of engineers, who shall examine said river and report upon the practicability and the best method of perfecting and maintaining a channel for through navigation to said fork at Lake Calumet, adapted

to the passage of the largest vessels navigating the northern and northwestern lakes, limiting and locating the lines of the channel to be improved by the United States, and of docks that may be constructed by private individuals, corporations or other parties, and clearly defining the same under the direction of the chief of engineers, United States army; and the secretary of war shall report to Congress the result of said examination and the estimated cost of the proposed improvement; also what legislation, if any, is necessary to prevent encroachments being made or maintained within the limits of the channel designated as above provided for."

This survey was made and the channels and dock lines along which the owners of the land bordering on the river might construct their docks were established and fixed and made a matter of public record by the recording of the plat of this survey. The act of July 5, 1884, expressly required that deeds should be taken from the owners of the land bordering upon the river conveying to the United States a right of way for this improvement, and, accordingly, C. R. Cummings, then the owner of these premises, and all other owners of the land on each side of the river between its outlet and the fork at Calumet lake, made their deeds to the United States, to each of which there was attached and made a part thereof a copy of this recorded plat, so far as it related to the premises covered by the deed, showing the dock line thus established by the United States for the premises; and in each deed it was expressly provided that the dock lines thus shown should thereafter be taken as the true meander lines of this stream. These deeds were made by these land owners by the requirement of Congress as a condition for its entering upon the improvement of this river, and must be construed as covenants between the United States and the owners of the land bordering on the river establishing, and for all time fixing, the dock lines along this river, and as providing

that these dock lines should be thereafter taken as the true meander lines of the stream.

The appellants are now the owners of the premises in question and are seeking to build their dock within this established dock line, which, in effect, has been declared by the United States to be the meander line of the stream in front of these premises, and they have as such owners, by virtue of the provisions of this deed and of these acts of Congress, the right to build their dock within this dock or established meander line.

Under the laws of Illinois the riparian owner of land bordering on a navigable stream is the owner in fee of the bed of the river to the center of the river, and at common law has a right to establish a wharf on his own soil and does not require special legislative authority to authorize him to erect wharves or docks in front of his premises if they do not become a nuisance by obstructing the paramount rights of navigation. His title to the bed of the stream is subject only to the easement of the public for the purpose of navigation, and the only restriction upon him as to the distance to which he shall build his dock in such navigable waters would be that he should not build it beyond the point of navigability or so as to become a public nuisance.

*Yates* v. *Milwaukee*, 10 Wall., 497.
*Chicago* v. *Laflin*, 49 Ill., 172.
*Chicago* v. *McGinn*, 51 Ill., 266.
*City of Chicago* v. *Van Ingen*, 152 Ill., 624.

So, when C. R. Cummings made his deed to the United States, under these acts of Congress and as a condition exacted by the United States precedent to the improvement of the river, he was the owner in fee of the bed of this stream to the center line thereof and his deed of conveyance, by

which he conveyed to the United States a right of way for the improvement of this stream, within the channel lines of the stream as established by the United States, was a relinquishment by him in part at least of his title and right as the owner of the bed of the stream, and the condition expressed in said deed that the dock line as shown upon the plat attached to the said deed should be and become hereafter for all purposes the true meander line of said stream became binding upon the United States. Meander lines are defined by this court in *Railroad Company* v. *Schurmeir*, 7 Wall., 286, as "run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale, and which is to be paid for by the purchaser." The meander line it is said is "represented as the border line of the stream." So when it was provided in these deeds to the United States, which Congress caused to be taken from the proprietors of the land bordering on this river, that the dock line established by the recorded plat of survey made under the direction of the chief of engineers and as shown by the plats attached to these deeds should be thereafter "for all purposes taken as the true meander lines of said stream," it was clearly intended to establish definitely and finally the said dock line as the shore line of the land bordering on the river within which line the owners could erect such structures in the improvement and use of their property as they should see fit. This intention is clearly expressed in the deed itself and is to be explained by the fact, which is alleged in the bill and admitted by the demurrer, that the United States, in the improvement of this river, was obliged to widen and deepen its channel between the points embraced

in the improvement, and in effect to make a navigable channel for this stream, so that Congress required that right of way should be conveyed to the United States by the owners of the lands bordering on the stream to enable it to make this channel, and directed that the channel lines and dock lines should be definitely located and established. In one sense this action was equivalent to the making of a navigable stream, having its shore or meander lines established by the dock lines. This is well illustrated by Exhibit A1, the copy of the recorded plat showing the survey made by the chief of engineers, which shows the channel lines somewhat north of block 108 as located across the adjoining land.

It is, therefore, submitted that under these two acts of Congress and under the deed made by their ancestor to the United States, in accordance with the provisions of the act of July 5, 1884, and under the survey which Congress caused to be made of this river establishing its dock lines and under the condition of the deed by which these dock lines are to be taken as the true meander lines of this stream for all purposes, the appellants became and are entitled to erect and maintain their dock in front of their premises within the dock line thus fixed and defined as the meander line of this stream without interference whatever from the State of Illinois or the City of Chicago, and to be protected by the injunction which they sought by their bill restraining the City of Chicago from interfering with them in the construction of their dock and from preventing them from so constructing it.

## III.

CONGRESS HAS TAKEN JURISDICTION OVER THIS RIVER AS ONE OF THE NAVIGABLE WATERS OF THE UNITED STATES AND HAS IMPROVED IT AND MADE IT NAVIGABLE AND AVAILABLE FOR COMMERCE, AND HAS DIRECTED AND CAUSED THE CHANNEL AND DOCK LINES OF THE RIVER TO BE DEFINED AND ESTABLISHED. ITS JURISDICTION OVER THIS RIVER FOR THE PURPOSE OF NAVIGATION AND THE PROTECTION THEREOF AND ITS POWER TO CONTROL THE BUILDING OF DOCKS OR OTHER STRUCTURES IN THIS RIVER IS, WHEN EXERCISED, SUPREME; AND NEITHER THE STATE OF ILLINOIS NOR THE CITY OF CHICAGO, ITS AGENT, HAS ANY POWER TO INTERFERE WITH OR PREVENT THE ERECTION OF ANY DOCK OR STRUCTURE WHICH CONGRESS HAS AUTHORIZED TO BE BUILT IN THIS RIVER.

It is unnecessary to discuss in this argument any question as to the general power and jurisdiction of the State of Illinois over navigable waters within the state in the absence of action by Congress in asserting its jurisdiction and power to control these navigable waters, so far as necessary to insure and protect their free navigation, and to regulate and control the erection of docks and other structures in said waters. The facts appearing on this record show that Congress has taken jurisdiction of this river and has developed and improved it and has caused, in its improvement of the river, its dock and channel lines to be fixed and established, and has caused conveyances to the United States to be taken from the proprietors of the land bordering on this river by which the dock line as fixed and established by the recorded plat of the survey made under the direction of the chief of engineers is also established and thereafter to be

taken as the true meander line of the stream, so that the question resolves itself into whether the State of Illinois or the City of Chicago, its agent, has any power or authority in view of the action thus taken by Congress to interfere with or prevent these appellants, acting under authority derived from Congress, from constructing and maintaining their dock along the front of their premises and within the dock line established by the United States and within the line which has been defined to be for all purposes hereafter the meander line of this stream. To this question there can be but one answer, namely, that neither the State of Illinois nor the City of Chicago, its agent, has any power whatever to interfere with or obstruct the appellants in the building of this dock under the permit issued to them by the secretary of war in accordance with section 10 of the act of March 3, 1899, and that the jurisdiction which Congress has taken over this stream is exclusive of any state interference.

The question has been so often presented to this court and decided by it that it would seem a work of supererogation to cite at any length the many decisions of this court which are conclusive on this question, but in view of the importance of the question to the appellants, and especially in view of the action of the court below in sustaining a demurrer to their bill, which admitted all of these facts showing the express action taken by Congress in the exercise of its jurisdiction over this river and the express permission and authority that issued to the appellants under the acts of Congress set out in the bill, we may be pardoned if we refer to a few of the very leading decisions of this court which are conclusive of the question.

The decision in *Gibbons* v. *Ogden*, 9 Wheat., 1 covers the whole question. There it was held that where the United States had issued a license to carry on the coasting trade, a

law of the State of New York purporting to compel the procurement of a license for navigating New York waters from the City of New York or its grantee was ineffective and must yield to the law of Congress; that the United States' license was "a permission or authority to do the thing," and that authority could not be interfered with by state legislation.

The question in that case was on all fours with the question in the case at bar. There Gibbons had a coasting license issued by the United States and it was attempted to restrain him from navigating New York waters because the State of New York had attempted to grant the exclusive navigation of its waters to others. Here, under the act of August 2, 1882, the United States has established the dock line for these premises in its improvement of this river, and by the deed taken from Cummings under the act of July 5, 1884, has agreed that this line shall be taken as the meander line, and the appellants have received permission or license, that has issued to them in accordance with the act of March 3, 1899, authorizing them to build their dock on their premises upon the plan approved by the chief of engineers, and the City of Chicago is attempting to interfere with them in the building of their dock and to prevent them from building it because they have not procured a permission or license from the department of public works of the City of Chicago. The principle applicable to both cases is the same, namely, that Congress having acted and taken control of this navigable river and having, in the exercise of its jurisdiction and power, authorized the issuance of this license or permit to the appellants, neither the State of Illinois nor the City of Chicago, its agent, can have any power whatever to interfere with the holder of this authority and license and prevent him from acting under and in accordance with it.

In *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 13 How-

ard, 518, 566, this court says: "No state law can hinder or obstruct the free use of a license granted under an act of Congress," and the exclusive power of Congress to determine what form of structure should be erected in a navigable water over which it had taken jurisdiction and to what degree or extent an obstruction of such water should be permitted, as, for example, the height of a bridge over a river or the distance to which a wharf should extend into navigable waters, was so clearly announced by this court as to have been unquestioned from the time of that decision to the present time. In all subsequent cases in which this question has been presented, the material inquiry has been whether Congress had asserted its jurisdiction in the premises and had acted so as to forbid the action of the state or its agents.

*Gilman* v. *Philadelphia*, 3 Wall., 713, 724.
*Pound* v. *Turck*, 95 U. S., 459.
*Wisconsin* v. *Duluth*, 96 *id.*, 379, 387.
*Bridge Co.* v. *United States*, 105 *id.*, 470, 475, 479.
*Cardwell* v. *American Bridge Co.*, 113 *id.*, 205.
*Willamette Iron Bridge Co.* v. *Hatch*, 125 *id.*, 1.

The power of Congress is not limited merely to the removal of obstructions in navigable waters over which it has taken jurisdiction, but it has the power to determine what shall or shall not be deemed, in the judgment of law, an obstruction of navigation and to authorize the erection and maintenance of structures in navigable waters.

In *Pennsylvania* v. *Wheeling, etc., Bridge Co.*, 18 Howard, 421, it was held that the power of Congress includes "the power to determine what shall or shall not be deemed, in

judgment of law, an obstruction to navigation," and, therefore, it was held that the bridge in question in that case, which had in the former opinion of the court in 13 Howard, 518, been held and declared to be an unlawful structure, had by the subsequent action of Congress, authorizing its maintenance, become a legal structure and therefore not in law an obstruction to the navigation of the river.

In the *Clinton Bridge*, 10 Wall., 454, the power of Congress to declare what is or what is not an illegal obstruction in a navigable stream was clearly announced.

We also cite *South Carolina* v. *Georgia*, 93 U. S., 4, in which this same power is clearly recognized and enforced.

In *North Bloomfield Gravel Mining Co.* v. *United States*, 88 Fed. Rep., 675, the Circuit Court of Appeals says:

"This admitted control upon the part of the general government over the navigable waters within the respective states is absolute. Does it not, therefore, necessarily follow that, in the exercise of such dominion and controll, Congress can determine and declare what constitutes an obstruction, injury, or interference to the navigable waters of the state, or an obstruction to commerce thereon, as welll as to determine and declare what acts shall be performed, and what character of works shall be constructed, in order to prevent injury to the navigable waters or an obstruction to commerce?"

No case can be found in which it has been held that a state or its agents can interfere with or prevent the erection of any structure in navigable waters which has been authorized by Congress, but on the contrary, in the few cases in which the attempt has been made by state authorities to prevent the erection of such structures, it has been held invariably that where Congress has authorized the erection and maintenance of the structure in the exercise of the power given it by the Constitution to regulate commerce the state

has no power whatever to interfere with the exercise of that authority.

*Decker* v. *B. & N. Y. R. Co.*, 30 Fed. Rep., 723.

*Stockton* v. *B. & N. Y. R. Co.*, 32 *id.*, 9.

*Penna. R. Co.* v. *N. Y. R. Co.*, 37 *id.*, 129.

In these cases the question was raised as to whether a private corporation could be authorized by Congress to build a bridge in and over navigable waters without the consent and against the protest of the state, and it was held that the state had no power whatever to interfere with the erection of such structure. In the Stockton case, *supra*, Mr. Justice Bradley says:

"We think that the power to regulate commerce between the states extends, not only to the control of the navigable waters of the country, and the lands under them, for the purposes of navigation, but for the purpose of erecting piers, bridges, and all other instrumentalities of commerce which, in the judgment of Congress, may be necessary or expedient."

In that case it was argued that the power of Congress could only be exercised with the concurrence and the consents of the states in which the structures are made, but the learned justice replies (p. 17):

"If this is so, then the power of regulation in Congress is not supreme; it depends on the will of the states. We do not concur in this view. We think that the power of Congress is supreme over the whole subject, unimpleaded and unembarrassed by state lines or state laws."

And at the conclusion of his opinion (p. 20) he says further:

"The power to regulate commerce is the basis of the power to regulate navigation, and navigable waters and streams, and these are so completely subject to the control of Congress, as subsidiary to commerce, that it has become usual to call the entire navigable waters of the country the navi-

gable waters of the United States. It matters little whether the United States had or has not the theoretical ownership and dominion in the waters, or the land under them; it has, what is more, the regulation and control of them for the purposes of commerce. So wide and extensive is the operation of this power that no state can place any obstruction in or upon any navigable waters against the will of Congress, and Congress may summarily remove such obstructions at its pleasure."

In view, therefore, of these decisions of this court it cannot be questioned but that Congress had power, in the improvement of this river, to cause the channel and dock lines to be fixed and established and to cause conveyances to be made by the proprietors of the lands bordering on the stream to the United States, defining and fixing the dock lines as the meander lines of the stream, and to issue to the proprietors of the lands bordering thereon license or permit to build their docks within the lines thus established by it as the dock lines of their premises; and no authority can be found to support the proposition that the State of Illinois or the City of Chicago, as its agent, has any power or authority to interfere with or prevent the erection of any dock authorized by Congress to be built upon this stream.

It may, however, be argued that the ordinances of the City of Chicago, which are referred to in the bill of complaint, requiring all parties who should be engaged in repairing, renewing, altering or constructing any dock within the City of Chicago to produce a permit issued from the department of public works and in default of the production thereof providing for the arrest of the parties engaged in such work and the removal of such dock were lawfully passed by the City of Chicago in the exercise of its general police power, and that notwithstanding the permit which has issued to the appellants by the secretary of war under the act of

Congress of March 3, 1899, the City of Chicago could lawfully prevent the erection of this dock because no permit had issued for the building of this dock by its department of public works; but this argument would simply amount to an assertion that, notwithstanding the exclusive power of Congress in the premises, and notwithstanding the established law that no state authority can lawfully interfere with or prevent the exercise of an authority granted by Congress within its powers, the State of Illinois can here prevent this work from going on, although authorized by the secretary of war under the act of Congress, because it has a police power and jurisdiction over its navigable waters. The answer to this argument is contained in the decisions of this court, which have been already cited, and it would seem unnecessary to repeat our argument. We will, however, add to the citations already made by citing the two cases of the *County of Mobile* v. *Kimball*, 102 U. S., 691, and *Escanaba Co.* v. *Chicago*, 107 U. S., 678, which may perhaps be relied upon by counsel for appellee in their discussion of this question. These two cases recognize the existence of a police power in the states within proper limits, that is to say, where the exercise of such power does not interfere with or come in conflict with the power of the United States.

In *County of Mobile* v. *Kimball* (p. 699) the court says:

"The states have as full control over their purely internal commerce as Congress has over commerce among the several states and with foreign nations; and to promote the growth of that internal commerce and insure its safety they have an undoubted right to remove obstructions from their harbors and rivers, deepen their channels, and improve them generally, *if they do not impair their free navigation as permitted under the laws of the United States, or defeat any system for the improvement of their navigation provided by the general government.*"

(Note—In the case at bar the establishing of these dock lines on this river was clearly a part of the system adopted by the United States for the improvement of the navigation of this river, because the act of August 2, 1882, the initial act in the premises, expressly provides for the definite location and fixing of these dock lines. Therefore, the issuance of the permit for the construction of this dock by the Secretary of War under the act of March 3, 1899, was merely carrying into effect the system adopted by Congress for the improvement of its navigation.)

So, also, in *Escanaba Co.* v. *Chicago* (p. 683), this court says:

"If the power of the state and that of the Federal government come in conflict, the latter must control and the former yield. * * * But until Congress acts on the subject, the power of the state over bridges across its navigable streams is plenary."

See, also,

*Sands* v. *Manistee River Imp. Co.*, 123 U. S., 288.

## IV.

UNDER THE PROVISIONS OF SECTION 10 OF THE ACT OF MARCH 3, 1899, THE SECRETARY OF WAR WAS EMPOWERED BY CONGRESS TO APPROVE AND PERMIT THE ERECTION OF DOCKS IN NAVIGABLE RIVERS OF THE UNITED STATES ON PLANS RECOMMENDED BY THE CHIEF OF ENGINEERS; AND THE PERMIT WHICH WAS ISSUED TO THE APPELLANTS BY THE SECRETARY OF WAR TO REBUILD THEIR DOCK IN FRONT OF THESE PREMISES ON THE PLAN ATTACHED THERETO, WHICH WAS APPROVED BY THE CHIEF OF ENGINEERS (EXHIBIT B) GAVE THEM FULL RIGHT AND AUTHORITY UNDER SAID ACT OF MARCH 3, 1899, TO BUILD SAID DOCK IN ACCORDANCE WITH SAID PERMIT, AND THE CITY OF CHICAGO HAD NO POWER OR AUTHORITY TO INTERFERE WITH OR PREVENT THEM FROM BUILDING THIS DOCK AND COULD NOT LAWFULLY STOP ITS CONSTRUCTION.

The provisions of this section of the act of March 3rd, 1899, are as follows:

Section 10 (act of March 3, 1899, U. S. Stats. at Large, Vol. 30, p. 1151):

"That the creation of any obstruction not affirmatively authorized by Congress to the navigable capacity of any of the waters of the United States is hereby prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the chief of engineers and authorized by the secretary of war; and it shall not be lawful to excavate, or fill, or in any manner to alter or modify the course, location, condition or capacity of any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any break-

water or of the channel of any navigable water of the United States, unless the work has been recommended by the chief of engineers and authorized by the secretary of war prior to beginning the same."

Pursuant to the provisions of this act the appellants applied to the secretary of war for the issuance of a permit approving and authorizing them to build their dock and submitted their plans for the construction of their dock to the secretary of war and to the chief of engineers of the United States army. The plans were approved by the United States engineer stationed at the City of Chicago and were subsequently recommended by the chief of engineers, and on the 12th of May, 1900, the secretary of war issued his permit to the appellants granting them permission to rebuild this dock in front of these premises along the lines shown by the plan, a copy of the plan being attached to the permit (see Exhibit B and copy of the plat attached thereto, Transcript, p. 12), and at the same time granted similar permission to the Calumet Grain and Elevator Company to build its dock in front of the south 300 feet of block 108 along the lines shown by the plans submitted. This permit recites the provisions of Section 10 of the Act of March 3, 1899, above quoted, and grants permission to the appellants and the Calumet Grain and Elevator Company to rebuild said dock along the lines shown on the plan, subject to the condition that the work therein permitted to be done should be subject to the supervision and approval of the engineer officer of the United States army in charge of the locality.

We submit that under this permit thus issued by the secretary of war the appellants became entitled, under Section 10 of the Act of March 3, 1899, to rebuild their dock in accordance with the permission thereby granted them, and

that this is a right which they have vested in them by the said Act of Congress. They became thereby the authorized agents of the United States for the building of this structure, which they were proposing to build within the dock line which had been established by the United States and which, by the terms of the deed of their ancestor, was to be taken for all purposes as the true meander line of the stream. Neither the State of Illinois nor the City of Chicago, its agent, could have any power to interfere with or obstruct them in the building of this structure thus authorized by and under said Act of Congress; and the City of Chicago, in interfering with and preventing them from building their dock in accordance with this permit, has proceeded unlawfully and wrongfully.

The appellants base their claim of right to build this dock without interference from the City of Chicago on two grounds:

First: Under the Act of August 2, 1882, by which Congress directed that this dock line should be definitely established on these premises, and under the Act of July 5, 1884, by which Congress directed that deeds should be taken from the proprietors and owners of the land bordering on this stream and of the bed thereof conveying to the United States the right of way for the channel, which was to be improved and made, and under the provisions of the deed, taken by the United States from their ancestor, that this dock line thus established under the Act of August 2, 1882, should be thereafter for all purposes taken as the "true meander line" of said stream; and

Second: Under the Act of March 3, 1899, and the permit that issued to them by the secretary of war under section 10 of that act.

As to the first ground on which this claim is based, we need only say in addition to the preceding argument that if effect is to be given to this provision of this deed, then the shore or meander line of the stream has been established by the United States under these acts of Congress, and as the owners of these premises the appellants are entitled under these acts of Congress to build their dock on these premises within this line, which is to be taken as the "meander" line of the premises, and the City of Chicago cannot interfere with them or prevent them from so doing. This right they have from the United States under these acts of Congress, and this is conceded by the demurrer to their bill, which alleges that this deed was made under the provisions of these acts and was exacted by the United States as a condition precedent to the improvement of the river.

Indeed, construing this deed in connection with the Act of August 2, 1882, providing that the lines "of docks that may be constructed by private individuals, corporations, or other parties" be located and clearly defined, it is apparent that Congress has in effect expressly authorized the shore owners to build their docks within this dock line, which has become established as the "true meander" line of the stream, so that the City of Chicago cannot lawfully interfere with them in building their docks within this line. It would have no right to prevent the riparian owner from building a dock within the meander line of his premises at common law, and here it cannot prevent these appellants from so doing, because Congress has in effect expressly established this as the meander line of the stream and authorized the building of docks within it. But, if this contention should not be sound, there can be no doubt but that the permit, which the secretary of war has issued to them under Section 10 of the Act of March 3, 1899, authorized the construction of this dock,

and that the City of Chicago cannot lawfully prevent the appellants from building it under this permit.

Section 10 of the Act of March 3, 1899, provides that it shall not be lawful to build any wharf, etc., in any navigable river or other waters of the United States, outside established harbor lines, or where no harbor lines have been established, "except on plans recommended by the chief of engineers and authorized by the secretary of war. * * *" *This can only be construed, we submit, as making it lawful to build such structure in such navigable rivers or waters, where the plans therefor have been recommended by the chief of engineers and authorized by the secretary of war, and as a grant by Congress of authority to build such structure on such plans, when so recommended and authorized,* and as superseding any power of the state or its agents to interfere with or prevent the building thereof.

Like the prior Act of September 19, 1890, this Act of March 3, 1899, was a direct statute of the United States regulating and controlling the erection of such structures in navigable streams and waters of the United States, and the ruling of this court, in *United States* v. *Bellingham Bay Boom Co.*, 176 U. S., 211, as to the Act of September 19, 1890, where it was held that by the passage of that act "Congress has acted upon the subject," must be followed here; so that all state authority to control this subject has been superseded, and the state cannot interfere with or prevent the building of a structure, which is thus expressly made lawful by this act of Congress.

The harbor of South Chicago, as the bill alleges (Trans., 3), is at the mouth of the river, and above the harbor, where the property of the appellants is located, the stream has been made by the United States navigable, and accessible

from the states, and the commerce thereon is almost wholly interstate. The dock, therefore, which the appellants are proposing to build, is one of the structures which under Section 10 of the act of March 3, 1899, must be *authorized* by the secretary of war on plans recommended by the chief of engineers.

It may be argued that this section of this act should be construed as merely negative and defensive, but this, we submit, would be an erroneous view of this statute, as it not merely makes the erection of an unauthorized structure unlawful, but in effect declares *it shall be lawful* to erect wharves, etc., in such waters on plans thus recommended and authorized. It is an express declaration of Congress that it shall be lawful to erect such structures in navigable rivers or waters of the United States upon plans recommended by the chief of engineers and *authorized* by the secretary of war.

If it were to be construed as merely defensive it would be equivalent to viewing it as only requiring the "approval" by the secretary of war of structures "authorized" by others. But the language of the statute is not that such structures should be approved, but should be *authorized*, and a comparison of Section 10 with other portions of this act and with the prior act of September 19, 1890, indicates very clearly the distinction between these two terms, and that the word "authorized" as used in Section 10 means something more than approval.

Thus in Section 9 of this act it is provided as to bridges, etc., over navigable rivers, etc., that it shall not be lawful to construct them unless the plans for the same shall have been *approved* by the secretary of war; that such structures over rivers lying wholly within the limits of a single

state may be *authorized* by the state authorities, but the plans are to be approved by the secretary of war before the construction is commenced. This will also be noted in Section 7 of the act of September 19, 1890.

In *L. S. & M. S. Ry. Co.* v. *Ohio*, 165 U. S., 365, 368, where the court had under consideration Section 7 of the act of September 19, 1890, the distinction was very clearly drawn between the approval of a structure, on the part of the secretary of war, authorized by law and the authorization by him of such structure, and the court holds that under this statute, which expressly provided that bridges over streams entirely within a state should be authorized by state authority was not intended to withdraw said structures from the authority of the state and lodge in the secretary of war the power to give original authority for the building of such structures.

The act of March 3, 1899, was adopted subsequent to this decision of this court with this distinction thus drawn between approving and authorizing the erection of said structures; and it must be held that in adopting Section 10 of the act of March 3, 1899, it was the intention of Congress to not merely limit the power of the secretary of war to the approval of plans for the erection of a structure authorized by others, but to authorize the erection of such structures on plans recommended by the chief of engineers.

Again, there is an important distinction, which must not be left out of view, between bridges over ordinary inland streams which are primarily and chiefly aids to local commerce and only incidentally affect interstate commerce, and docks which are only constructed as a rule at the seaboard or on the Great Lakes or the great rivers, where in-

terstate or international commerce is the chief consideration and the local traffic the incident. Congress might very reasonably conclude that the local authorities were best able to judge of the local necessity with respect to inland bridges and that the necessities of interstate commerce would be sufficiently protected by requiring that plans for erection of structures of this class as should be authorized by the state authorities must be approved by the secretary of war: but as to docks, which are primarily and chiefly instruments or aids to interstate commerce, that the control should be exercised by the Federal authority. Therefore, the provisions as to these two classes of structures are to be found in this act in separate sections and in vitally different language, and in the one case (Section 9 of this act) the authority for the erection of the structure is to be given by the state and the approval by the secretary of war, and in the other (Section 10) the structure cannot be erected except upon plans recommended by the chief of engineers and *authorized* by the secretary of war.

If the secretary of war under this section of this act may not "authorize" the building of docks or other structures in navigable streams or waters of the United States outside established harbor lines, or where no harbor lines have been established, then there is no lawful authority for the erection of such structures and their erection must be held to be entirely forbidden. It is not conceivable that in an act making large appropriations for the encouragement and development of interstate commerce by water Congress intended to forbid the erection of such structures without which such commerce is impracticable, if the necessity existed for them.

It may, also, be argued, that Congress cannot delegate to the secretary of war the power to authorize the erection

of this structure and issue this permit, and that this is an unlawful delegation of legislative power; but this argument would, if sound, also establish that the requirement of the "approval" of the secretary of war of improvements authorized by others is equally unlawful, as the power to forbid is as plainly legislative as the power to authorize, and the one can no more be delegated than the other. But it is nowhere denied, that Congress can require that the plans of any proposed structure in the navigable waters of the United States be *approved* by executive officers, and that without such approval they may not be built.

In neither case is any law-making power delegated. Congress in each instance makes the law, and establishes the conditions under which these structures may be built.

This question was raised in *Lake Shore & Michigan Railway* v. *Ohio*, 165 U. S., 365, but was passed by this court without deciding it as unnecessary to the decision of the case.

The decision in *Miller* v. *Mayor of New York*, 109 U. S., 385, is very much in point; and we also cite on this question the cases which are referred to in our brief under this point, and especially the cases of

*Luther* v. *Borden*, 7 Howard, 1, 11.
*Field* v. *Clark*, 143 U. S., 649.
*United States* v. *Bellingham Bay Boom Company*, 176 U. S., 211, 217.

It would be practically impossible for Congress to exercise its jurisdiction and control over navigable waters and the structures that might be properly permitted to be erected therein except through agents. As is well said by Judge Grosscup in *United States* v. *City of Moline*, 82 Fed. Rep., 598:

"A thousand questions of equal moment to the parties interested, and of equal difficulty, are necessarily delegated to the great departments of the government every month. In the very nature of things, Congress cannot dispose of them. A government of the size of this, operated upon such a conception, would be clogged immediately."

If we are right in our construction of the act of March 3, 1899, the authority to erect such structures in navigable rivers and waters of the United States is derived from Congress, and it has only delegated to the chief of engineers on the one hand the power to pass upon and recommend the plans upon which said structures may be permitted to be erected and to the secretary of war on the other hand the power to authorize their erection on the plans so recommended.

## V.

THE RIGHT TO BUILD THIS STRUCTURE UPON THEIR PREMISES WITHIN THE DOCK LINE ESTABLISHED BY THE UNITED STATES AND UNDER THE PERMIT ISSUED TO THEM UNDER THE SAID ACT OF CONGRESS IS A PROPERTY RIGHT VESTED IN THE APPELLANTS WHICH IS CONCEDED TO BE OF GREATER VALUE THAN $2,000, AND THE ACTION OF THE CITY OF CHICAGO IN PREVENTING THE BUILDING OF SAID DOCK BY THE APPELLANTS IS A TAKING OF THEIR PROPERTY WITHOUT DUE PROCESS OF LAW AND A TAKING THEREOF FOR PUBLIC USE WITHOUT JUST COMPENSATION IN VIOLATION OF THE PROVISIONS OF THE CONSTITUTION OF THE UNITED STATES.

Here, also, no argument is required to establish the proposition asserted. That the appellants have a property right in the building of this structure on their own property and have, as the owners of these premises, the right

to build this dock with the permission which has been granted to them under said act of Congress, and that this right is of very substantial value, cannot be questioned. The City of Chicago by its action in preventing them from building this dock has in effect deprived them of this property right and this it does without lawful authority, and, as is alleged in the bill and admitted by the demurrer, without due process of law, and it is equivalent to a taking of their property without due process of law in violation of the Constitution.

(NOTE: It would appear from the transcript of the record, page 10, that the bill alleges in this regard that this action of the City of Chicago is in violation of the "fifth amendment of the Constitution of the United States." It would seem that some error has intervened either in the draughting of the bill or in the preparation of the record, as the amendment to the Constitution which is applicable here is the fourteenth amendment and not the fifth.)

In conclusion it is, therefore, respectfully submitted that the decree of the court below sustaining this demurrer to the appellants' bill of complaint and dismissing the bill for want of equity was erroneous and should now be reversed and the cause remanded for further proceedings.

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